IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHOENIX FOUR GRANTOR TRUST #1	:	
Plaintiff and Counterclaim Defendant	:	CIVIL ACTION
	:	
v.	:	
	:	
642 NORTH BROAD STREET	:	NO. 00-597
ASSOCIATES, et al.	:	
Defendants and Counterclaim Plaintiffs	:	

MEMORANDUM AND ORDER

YOHN, J. June , 2000

Phoenix Four Grantor Trust #1 ["Phoenix"] is the holder of two mortgages executed by 642 North Broad Street Associates and 660 North Broad Street Associates [collectively "Assocs."] and guaranteed by P & A Associates ["P & A"], as well as by Alan Casnoff and Peter Shaw. The maturity date of the mortgages was December 31, 1999, at which time the outstanding principal of more than $11,000,000 was payable. No payment was made, and Phoenix sued Assocs. and P & A on the mortgages and Casnoff and Shaw on their guarantee. In their answer to Phoenix's amended complaint, Assocs., P & A, Casnoff, and Shaw [collectively "counterclaim plaintiffs"] assert counterclaims against Phoenix.

Pending before the court is Phoenix's motion to dismiss the counterclaims for failure to state a claim on which relief can be granted and to dismiss the counterclaims of Casnoff and Shaw for lack of standing. The court will grant Phoenix's motion with respect to the conversion and unjust enrichment counterclaims in Counts V and VI because the contracts attached as exhibits to the counterclaims preclude the assertion of these causes of action. The court will also grant Phoenix's motion with respect to the intentional interference with contractual relations

counterclaim in Count VIII because Count VIII gives no indication that the interference alleged was motivated by a malevolent purpose or directed to a third party. Moreover, the court will grant Phoenix's motion with respect to all counterclaims by Casnoff and Shaw because they lack standing as guarantors and are not indispensable parties. The court will deny Phoenix's motion in all other respects.

I. Background

The counterclaims contain the following allegations.

Casnoff and Shaw are the general partners of P & A, and P & A is the general partner of Assocs. *See* Defs.' Answer, Affirmative Defenses & Countercls. (Doc. No. 5) ["Countercls."] ¶¶ 59-60. All counterclaim plaintiffs are citizens of Pennsylvania. *See id*. ¶¶ 59-63.

In 1994, Summit Bank extended a term loan of over $11,000,000 to Assocs. *See id*. ¶¶ 68-69. This loan was evidenced by a promissory note and was secured by mortgages on an office building at 642 North Broad Street and a parking lot at 660 North Broad Street in Philadelphia, Pennsylvania ["properties"], by assignments of leases and rents ["rent assignments"], by a guarantee of Assocs.' debts by P & A, Casnoff, and Shaw, and by other loan documents. *See id*. ¶¶ 68, 71. By its terms, the rent assignments, inter alia, transfers title in the rents generated by the properties from Assocs. to Summit Bank but also creates a revocable license for Assocs. to collect and enjoy the rents from the leases. *See id*. ¶ 81, Exs. E ¶¶ 1-2, F ¶¶ 1-2.

On August 13, 1997, Summit Bank assigned its interests in the mortgages and loan documents to Phoenix, a citizen of Delaware. *See id*. ¶¶ 66, 73-74. In September 1998, Phoenix

revoked Assocs.' right to collect and enjoy the rents from the properties and began collecting the rents itself and depositing them in a lockbox account. *See id*. ¶ 82. On November 5, 1998, Phoenix and Assocs. entered into a cash management agreement ["CMA"] that, inter alia, allows Phoenix to release the rents to Assocs. to cover the properties' operating expenses and to apply any rents not released as operating expenses ["excess rents"] to Assocs.' existing indebtedness. *See id*. ¶ 83, Ex. M ¶¶ 3-4.

When the mortgages matured and were not paid, Phoenix sued Assocs. and P & A, asserting a breach of the promissory note. *See* Compl. (Doc. No. 1) ¶¶ 30-36. Phoenix also asserted a claim against Shaw and Casnoff as guarantors of the mortgages and sought to foreclose on the mortgages and to take possession of the properties. *See id*. ¶¶ 37-47. In an amended complaint, Phoenix asserts the same claims against the same parties. *See* Am. Compl. (Doc. No. 2) ¶¶ 30-47.

In their answer to the amended complaint, the counterclaim plaintiffs assert eight counterclaims. The counterclaim plaintiffs allege breaches of the CMA (Count I) and a November 1999 oral contract to fund a fit-out of space for Philadelphia Child Care ["PCC"], a tenant (Count II). *See* Countercls. ¶¶ 97-109. Relatedly, the counterclaim plaintiffs argue that Phoenix intentionally interfered with Assocs.' lease with PCC (Count VIII). *See id*. ¶¶ 142-49. They also claim that Phoenix breached its implied duty of good faith (Count III). *See id*. ¶¶ 110-16. Phoenix also allegedly owed the counterclaim plaintiffs a fiduciary duty, which they claim it breached (Count IV). *See id*. ¶¶ 117-21. Because Phoenix has neither applied the excess rents to Assocs.' existing indebtedness nor refunded it to the counterclaim plaintiffs, the counterclaim plaintiffs also assert claims for conversion of the excess rents (Count V) and unjust enrichment

(Count VI). *See id*. ¶¶ 122-34. The counterclaim plaintiffs ask the court to place the excess rents in the lockbox account in a constructive trust (Count VII). *See id*. ¶¶ 135-41.

II. Legal Standard

Phoenix has filed a motion to dismiss for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *See Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant." *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). At this stage of the litigation, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In deciding a motion to dismiss, a district court also may consider exhibits attached to the complaint and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Id.* (citations omitted).

The Federal Rules of Civil Procedure do not, however, require detailed pleading of the facts on which a claim is based. Instead, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief," enough to "'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Fed. R. Civ. P. 8(a)(2);

Rannels v. S.E. Nichols, Inc., 591 F.2d 242, 245 (3d Cir. 1979) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Indeed, the Appendix of Forms to the Federal Rules of Civil Procedure contains an example of a negligence complaint that satisfies Rule 8(a)(2) that includes only a statement of jurisdiction, a description of injuries, and an allegation that "defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." App. of Forms to Fed. R. Civ. P., Form 9.

III. Discussion

A. Choice of Law

The parties do not adequately address choice of law issues in their briefs. Phoenix's treatment of the issue is contained in a footnote in its memorandum of law in support of its motion, in which Phoenix points out that some of the loan documents contain choice of law provisions. *See* Pl.'s Mem. of Law in Supp. of Mot. to Dismiss Countercls. (Doc. No. 7) ["Phoenix Mem."] at 12 n.7. For example, the rent assignments state that New Jersey law shall control. *See* Countercls. Exs. E ¶ 13, F ¶ 13. The mortgages, however, contain no choice of law provision, *see* Countercls. Exs. C, D, but Phoenix contends that Pennsylvania law will control because the properties are in Pennsylvania. *See* Phoenix Mem. at 12 n.7 (citing *Hall v. Hoff*, 145 A. 301, 302 (Pa. 1929)); *see also Howell v. Kline*, 41 A.2d 580, 581-82 (Pa. Super. Ct. 1945) (supporting Phoenix's contention). Although Phoenix does not mention it in this footnote, the CMA contains no choice of law provision. *See* Countercls. Ex. M. The counterclaim plaintiffs' treatment of the issue is also contained in a footnote, in which they state simply that the interpretation of the provisions of the loan documents will be governed by New Jersey law and

cite Phoenix's choice of law footnote. *See* Defs.' Mem. of Law in Opp'n to Pl.'s Mot. to Dismiss the Countercls. (Doc. No. 9) ["Counterlcl. Pls.' Resp."] at 15 n.6. Although the parties agree that Pennsylvania law applies to two of the eight counterclaims, their filings offer no other guidance on which state's law should apply to the other six counterclaims. *See infra* notes 4, 6.

In diversity cases, federal courts apply the substantive law of the forum state. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1940); *Borman v. Raymark Indus.*, 960 F.2d 327, 331 (3d Cir. 1992). A federal court sitting in diversity looks to the choice of law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir. 1996). Because the court is in Pennsylvania, I look to the choice of law rules that a Pennsylvania court would apply. *See LeJeune*, 85 F.3d at 1071.

Where no effective choice of law has been made by the parties, courts in the Third Circuit interpret Pennsylvania law to require a two-step inquiry into applicable law. *See LeJeune*, 85 F.3d at 1071; *Kirby v. Lee*, Civ. A. No. 98-6483, 1999 WL 562750, at *1 (E.D. Pa. July 22, 1999). The choice of law analysis must be conducted with respect to the particular issues presented, such that different law may apply to different causes of action. *See generally DuSesoi v. United Ref. Co.*, 540 F. Supp. 1260, 1266-68, 1272-73 (W.D. Pa. 1982) (analyzing choice of law separately as to breach of written contract, breach of oral contract, and fraud); Restatement (Second) Conflicts of Law §§ 145 (limiting tort analysis to the "particular issue"), 188 (limiting contract analysis to the "particular issue").

The first step requires determining whether an actual conflict exists. If the different laws do not produce different results, then courts presume that the law of the forum state shall apply.

See McFadden v. Burton, 645 F. Supp. 457, 461 (E.D. Pa. 1986); *Denenberg v. American Family Corp.*, 566 F. Supp. 1242, 1251 (E.D. Pa. 1983), *superseded on other grounds as explained in, Miniscalco v. Gordon*, 916 F. Supp. 478, 481 (E.D. Pa. 1996). *See generally Borman*, 960 F.2d at 331 (noting that law of the forum state applies in diversity cases). As will be seen below, the court is confronted with identical results in the six counterclaims about which the parties do not agree on the applicable law. Thus, the court presumes Pennsylvania law applies to these counterclaims.

B. Merits of the Counterclaims

1. Count I: Breach of Contract

In Count I, the counterclaim plaintiffs allege that Phoenix breached the CMA by not refunding to them the excess rents, by not applying the excess rents to Assocs.' existing indebtedness, by not using the excess rents to fund tenant fit-outs, and by not paying the properties' monthly operating expenses in a timely manner. *See* Countercls. ¶ 100. In the counterclaim plaintiffs' response, however, they narrowly focus on the allegation that Phoenix failed to pay the operating expenses in a timely manner.[1] *See* Countercl. Pls.' Resp. at 8-9.

With respect to the counterclaim plaintiffs' claim of breach through untimely payment of the monthly operating expenses, Phoenix contends that the counterclaim plaintiffs have not given

[1]Although neither party addresses this issue, I note that the CMA does not contain a provision expressly dealing with the timing of Phoenix's payments thereunder. It does, however, contain enough indications of the timing of the payments to preclude the court from concluding at this early stage of the proceedings, and without any briefing, that the CMA does not require Phoenix's payments to be timely. *See, e.g.*, Countercls. Ex. M. ¶ 3 (referring repeatedly to "the prior month").

it fair notice of the grounds on which the claim rests.[2] *See* Pl.'s Reply Br. in Further Supp. of the Mot. to Dismiss Countercls. (Doc. No. 12) ["Phoenix Reply"] at 5-6. Phoenix also argues that the counterclaim plaintiffs have not complied with certain conditions precedent to bringing suit for a breach of the CMA. *See id*. at 6-7. Neither argument is persuasive.

The counterclaim plaintiffs have alleged that Phoenix "repeatedly breach[ed] the Cash Management Contract" and have specified the manner in which the CMA was breached. *See* Countercls. ¶¶ 100(b), 101. Considering the liberal pleading standard of the Federal Rules of Civil Procedure, I conclude that the counterclaim plaintiffs have "give[n] the [counterclaim] defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Rannels*, 591 F.2d at 245 (internal quotation marks omitted). With respect to the conditions precedent to bringing suit, the counterclaim plaintiffs have alleged their satisfaction. *See* Countercls. ¶ 103.

For these reasons, I conclude that Phoenix has not established "that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count I. *Hishon*, 467 U.S. at 73. As a result, the court will deny Phoenix's motion to dismiss with respect to Count I.

2. Count II: Breach of Contract

In Count II, the counterclaim plaintiffs claim that Phoenix breached "an oral contract" to use $160,000 of excess rents to fund a fit-out for PCC. Countercls. ¶ 105; *see id*. ¶¶ 106-07. In its response, the counterclaim plaintiffs attempt to recast Count II as a claim that Phoenix

[2]Phoenix does not squarely address this alleged breach of the CMA in its memorandum in support of its motion. *See* Phoenix Mem. at 20-24.

breached an oral agreement to perform its pre-existing duty to fund fit-outs under the CMA, the rent assignments, and the mortgages. *See* Countercl. Pls.' Resp. at 11. The allegations of Count II and the reasonable inferences that can be drawn therefrom, as well as the CMA, the rent assignments, and the mortgages, do not support such an interpretation. *See* Countercls. ¶¶ 104-09, Exs. C ¶ 12, D ¶ 12, E ¶ 5, F ¶ 5, M ¶ 4(a).

The counterclaim plaintiffs' attempted recasting of Count II is understandable considering the substance of Phoenix's argument for the dismissal of Count II: the contract that was allegedly breached runs afoul of the statute of frauds. *See* Phoenix Mem. at 26-28. According to the terms of the rent assignments, any money expended by Phoenix pursuant to its optional assumption of a lease obligation of Assocs., such as the $160,000 fit-out for PCC, would be added to the amount of the existing indebtedness secured by the mortgages. *See* Countercls. Exs. E ¶ 5, F ¶ 5; *see also id*. ¶¶ 87-90 (stating that PCC agreed to its lease based in part on an agreement with Assocs. that the space would be fitted-out). Thus, any agreement by Phoenix to fund the PCC fit-out would effectively modify the terms of the mortgages. As Phoenix points out, because the mortgages constitute interests in land, under both New Jersey and Pennsylvania law, the statute of frauds requires any modification of those mortgages to be in writing. *See* Phoenix Mem. at 26-28 (citing *Linsker v. Savings of America*, 710 F. Supp. 598, 600 (E.D. Pa. 1989) (recognizing that an oral agreement to lend money secured by a mortgage is subject to the statute of frauds under Pennsylvania law); *Dworman v. Mayor of Morristown*, 370 F. Supp. 1056, 1066 (D.N.J. 1974) (acknowledging that under New Jersey law, the modification of any document subject to the statute of frauds must be in writing); *Cauco v. Galante*, 77 A.2d 793, 797 (N.J. 1951) (recognizing that a mortgage creates an interest in land within the statute of frauds)). Because

the alleged agreement was oral and, thus, problematic under the statute of frauds, Phoenix seeks dismissal of Count II. *See id*.; Phoenix Reply at 8-9.

Federal courts dealing with both the Pennsylvania statute of frauds and the New Jersey statute of frauds have recognized that a statute of frauds defect may properly be the subject of a Rule 12(b)(6) motion to dismiss even though a statute of frauds defect is an affirmative defense. *See Flight Sys., Inc. v. Electronic Data Sys. Corp.*, 112 F.3d 124, 127 (3d Cir. 1997) (considering Pennsylvania's statute of frauds); *Simmons Oil Corp. v. Bulk Sales Corp*., 498 F. Supp. 457, 460 (D.N.J. 1980) (considering New Jersey's statute of frauds). These courts have, however, set a high standard for the dismissal of a claim for this reason.

Under Pennsylvania law, a court should only dismiss a breach of contract claim due to a statute of frauds defect if "trial would be a 'fruitless exercise.'" *Flight Sys.*, 112 F.3d at 127 (quoting *Keil v. Good*, 356 A.2d 768, 771 (Pa. 1976)). The statute of frauds writing requirement for transfers of interests in land is, however, a waivable defense. *See Blumer v. Dorfman*, 289 A.2d 463, 468 (Pa. 1972). Based on this waivability and Pennsylvania courts' interpretation of the statute of frauds as a protective shield and not an offensive weapon, the Third Circuit has stated that "[a]llowing [a defendant] to dispose of [a] breach of contract claim before it has even submitted an answer would enable [the defendant] to use the statute of frauds as a sword, in contravention of the statute's purpose." *Flight Sys.*, 112 F.3d at 128. Thus, I cannot dismiss this breach of contract claim under Pennsylvania law.

New Jersey law sets a similarly high standard. A district court considering this issue stated that dismissal of a breach of contract claim is inappropriate if facts could be proved consistent with the allegations in the pleading that would permit avoidance of the statute of

frauds defect. *See Simmons Oil*, 498 F. Supp. at 460. The court agrees with this statement. *See Hishon*, 467 U.S. at 73. Under New Jersey law, an oral contract that runs afoul of the statute of frauds, such as the one alleged in Count II, is nonetheless enforceable if it can be proved by clear and convincing evidence. *See* N.J. Stat. Ann. §§ 25:1-11, 25:1-13. Because I cannot conclude from the pleadings that the counterclaim plaintiffs will be unable to prove the disputed oral contract by clear and convincing evidence, I cannot dismiss this breach of contract claim under New Jersey law, either.

Phoenix has not demonstrated "that no relief could be granted under any set of facts that could be proved consistent with the allegations" of Count II. *Hishon*, 467 U.S. at 73 (1984). As a result, the court will deny Phoenix's motion to dismiss with respect to Count II.

3. Count III: Breach of Duty of Good Faith

In Count III, the counterclaim plaintiffs allege that Phoenix breached its implied duty of good faith and acted to frustrate its contracts with Assocs. by failing to perform under the CMA or performing only after repeated requests for performance and by failing to negotiate in good faith regarding fit-outs, refinancing the existing indebtedness, and subordinating Phoenix's rights to those of tenants through non-disturbance agreements. *See* Countercls. ¶ 113. Phoenix argues that it has no implied duty of good faith. *See* Phoenix Mem. at 15-19.

The implied duty of good faith requires that a party to a contract "'refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract.'" *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 702 (3d Cir. 1993) (quoting *Daniel B. Van Campen Corp. v. Building & Constr. Trades Council*, 195 A.2d 134, 136-37 (Pa. Super. Ct.

1963)); *see Rodin Properties-Shore Mall, N.V. v. Cushman & Wakefield of Pennsylvania, Inc.*, 49 F. Supp. 2d 728, 735 (D.N.J. 1999) (recognizing that the same definition applies under New Jersey law). Thus, if Phoenix unnecessarily delayed paying the monthly operating expenses it agreed to pay in an attempt to force Assocs. into default, then Phoenix would have been violating an implied duty of good faith if one existed. *See* Countercls. ¶¶ 113(a), 115. Pennsylvania law and New Jersey law, however, create the implied duty of good faith in different situations.

Although some Pennsylvania courts have stated that an implied duty of good faith inheres in every contract, the Third Circuit has predicted that under Pennsylvania law, a contract does not imply a duty of good faith in "a situation . . . in which there already exists an adequate remedy at law." *Parkway Garage*, 5 F.3d at 702; *see Fremont v. E.I. DuPont DeNemours & Co.*, 988 F. Supp. 870, 874 (E.D. Pa. 1997) (citing decisions in which the Superior Court of Pennsylvania stated that an implied duty of good faith inheres in every contract). Thus, if the counterclaim plaintiffs could clearly recover on Count I's breach of contract claim for Phoenix's allegedly dilatory payment of the monthly operating expenses, then under Pennsylvania law, there would be no need for the CMA to imply that Phoenix had a duty to exercise good faith in its payment of the monthly operating expenses. It is not clear, however, that the CMA contains a requirement that Phoenix pay the monthly operating expenses in a timely manner. *See supra* note 1. Thus, it is not clear that an adequate remedy at law already exists for Phoenix's allegedly untimely payments. Consequently, under Pennsylvania law, Phoenix may have an implied duty to pay the monthly operating expenses in a timely manner, depending on the availability to the counterclaim plaintiffs of a claim for the breach of contract alleged in Count I. For this reason, Pennsylvania law dictates that Count III should not be dismissed.

The same conclusion can be reached under New Jersey law much more easily. Unlike Pennsylvania law, New Jersey law is clear that a duty of good faith "is implied in all contracts." *Association Group Life, Inc. v. Catholic War Veterans*, 293 A.2d 382, 384 (N.J. 1972). Thus, a duty of good faith is implied in the CMA under New Jersey law. If Phoenix agreed to pay the monthly operating expenses pursuant to the CMA, then it had a duty to do so in a manner consistent with good faith. Phoenix's allegedly dilatory payments would have violated that duty. Therefore, New Jersey law also dictates Count III should not be dismissed.

The court is not convinced "that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count III. *Hishon*, 467 U.S. at 73. As a result, I will deny Phoenix's motion to dismiss with respect to Count III.

4. Count IV: Breach of Fiduciary Duty

In Count IV, the counterclaim plaintiffs assert that Phoenix owed them a fiduciary duty because of its relationship with them and that Phoenix violated that fiduciary duty. *See* Countercls. ¶¶ 119-20. Phoenix argues that Count IV should be dismissed because it had no fiduciary duty to the counterclaim plaintiffs. *See* Phoenix Mem. at 12-14, 19-20; Phoenix Reply at 13-16.

Under Pennsylvania law, the lender-borrower relationship does not ordinarily create a fiduciary duty. *See Federal Land Bank of Baltimore v. Fetner*, 410 A.2d 344, 348 (Pa. Super. Ct. 1979). If a creditor "'gains substantial control over the debtor's business affairs,'" however, a confidential relationship may result. *Blue Line Coal Co. v. Equibank*, 683 F. Supp. 493, 496 (E.D. Pa. 1988) (quoting *Stainton v. Tarantino*, 637 F. Supp. 1051, 1066 (E.D. Pa. 1986). Such

control is demonstrated either by the creditor's involvement in the debtor's day-to-day operations or by the lender's ability to compel the borrower to engage in unusual transactions. *See Temp-Way Corp. v. Continental Bank*, 139 B.R. 299, 318 (E.D. Pa. 1992).

Although New Jersey courts do not appear to have addressed this exact issue, they do acknowledge that the lender-borrower relationship does not generally create a fiduciary duty. *See, e.g., New Jersey Econ. Dev. Auth. v. Pavonia Restaurant, Inc.*, 725 A.2d 1133, 1139 (N.J. Super. Ct. App. Div. 1998). The Supreme Court of New Jersey has, however, recognized that a mortgagee may owe additional duties to an owner/mortgagor if the mortgagee "take[s] out of the hands of the mortgagor the management and control of the estate." *Scott v. Hoboken Bank for Sav.*, 19 A.2d 327, 330 (N.J. 1941) (internal quotation marks omitted). Considering this statement, as well as the uniformity with which courts in other jurisdictions have recognized the creation of a confidential relationship when a creditor gains substantial control over a debtor, I predict that New Jersey would also recognize the creation of a fiduciary duty in this situation. *See Blue Line Coal*, 683 F. Supp. at 496-97 (citing cases from other jurisdictions).

The counterclaim plaintiffs allege that Phoenix's fiduciary duty arose out of the loan documents. *See* Countercls. ¶ 118. An examination of the loan documents reveals the possibility that a fiduciary duty may have been created therein through the granting to Phoenix of substantial control over Assocs. According to the mortgages, all leases entered into by Assocs. are subject to review by Phoenix pursuant to the loan agreement. *See id*. Exs. C ¶ 15, D ¶ 15. The loan agreement, in turn, appears to give Phoenix the power to veto any proposed lease. *See id*. Ex. B ¶¶ 4.01(b), 4.01(b)(12)-(14). Additionally, the CMA appears to give Phoenix absolute discretion

in deciding whether to pay the monthly operating expenses and whether to apply the excess rents to the existing indebtedness.[3] *See id*. Ex. M. ¶¶ 3(b), 4(d).

Considering these provisions, I am unwilling to conclude at this early stage of the proceedings that Phoenix's control over Assocs. was insufficient to give it the ability to force Assocs. to engage in unusual transactions and, thus, insufficient to create a fiduciary duty. *See Temp-Way*, 139 B.R. at 318. Therefore, I do not consider Phoenix to have demonstrated "that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count IV. *Hishon*, 467 U.S. at 73. As a result, the court will deny Phoenix's motion to dismiss with respect to Count IV.

5. Count V: Conversion

In Count V, the counterclaim plaintiffs claim that Phoenix converted the excess rents. *See* Countercls. at 19. They allege that they contracted with Phoenix to have the excess rents either refunded to them or applied to the existing indebtedness. *See id*. ¶ 123. Moreover, they claim that Phoenix wrongfully exerted dominion over the excess rents by refusing to refund or apply the excess rents as promised. *See id*. ¶¶ 124-27.

Under Pennsylvania law, conversion is "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent

[3]Although the CMA appears to give Phoenix the power to decide whether or not to pay the monthly operating expenses, it may include some restriction on the timing of any payment it decided to make. *See supra* note 1.

and without lawful justification."[4] *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 726 (Pa. 1964). Phoenix argues that the conversion counterclaim runs afoul of several parts of this definition.

First, Phoenix contends that the counterclaim plaintiffs had no right to have the excess rents refunded to them or applied to the existing indebtedness. *See* Phoenix Mem. at 29; *see also* Phoenix Reply at 17-18. Although the counterclaim plaintiffs allege that Assocs. contracted with Phoenix for the right to have the excess rents refunded or applied to the existing indebtedness, the court is not bound to accept this allegation blindly. In deciding a motion to dismiss, a court may consider exhibits attached to a complaint, as well as the complaint itself. *See Pension Benefit Guar.*, 998 F.2d at 1196.

The contracts attached as exhibits to the counterclaims contradict the counterclaim plaintiffs' allegation that they had a contractual right to have the excess rents refunded or applied to the existing indebtedness. The rent assignments clearly transfer all rights to the rents, excess or otherwise, to Phoenix. *See* Countercls. Exs. E ¶¶ 1-2, F ¶¶ 1-2; *see also Commerce Bank v. Mountain View Village, Inc.*, 5 F.3d 34, 38 (3d Cir. 1993) (recognizing that under Pennsylvania law, an assignment of rents may transfer all rights in rents to a mortgagee). Moreover, although the CMA and the rent assignments allow Phoenix to apply the excess rents to Assocs.' existing indebtedness, these documents do not mandate such an application, and none of these contracts appear to require a refund of the excess rents. *See* Countercls. Exs. E ¶ 9(b), F ¶ 9(b), M ¶ 4(d).

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[4]The parties apparently agree that Pennsylvania law applies to Count V. In the three briefs concerning Phoenix's motion to dismiss, the parties cite only a single case dealing with New Jersey law, as compared with seven cases concerning Pennsylvania law. *See* Phoenix Mem. at 29-31; Counterclaim Pls.' Resp. at 19-20; Phoenix Reply at 17-18.

Thus, the counterclaims do not establish on their face that the counterclaim plaintiffs had any contractual right to have the excess rents refunded or applied to the existing indebtedness.[5]

Alternatively, Phoenix argues that a conversion claim is the improper vehicle for the counterclaim plaintiffs to seek redress for the wrong alleged in Count V. *See* Phoenix Mem. at 30-31. Under Pennsylvania law, if a plaintiff's rights to property are defined by a contract with a defendant, then that plaintiff may not sue that defendant in tort for conversion of that property. *See Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n,* 856 F. Supp. 910, 929-30 (E.D. Pa. 1994). The counterclaim plaintiffs allege that a contract with Phoenix created their right to have the excess rents refunded or applied to the existing indebtedness. *See* Countercls. ¶ 123. Thus, in order to enforce their contractual right to that property, the counterclaim plaintiffs must claim a breach of that contract, not conversion of that property. *See Peoples Mortgage*, 856 F. Supp at 929-30.

For these reasons, the court concludes that Phoenix has made "it . . . clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count V. *Hishon*, 467 U.S. at 73. As a result, I will grant Phoenix's motion to dismiss with respect to Count V and will dismiss that count with prejudice.

[5]Even if the counterclaims did establish that the counterclaim plaintiffs had a contractual right to have the excess rents refunded or applied to the existing indebtedness, Phoenix argues that the rent assignments and the CMA evidence Assocs.' consent to Phoenix's exercise of dominion over the excess rents, which would preclude a claim for conversion. *See Stevenson*, 197 A.2d at 726 (listing lack of consent as an essential part of a conversion claim); Phoenix Mem. at 29-30.

6. Count VI: Unjust Enrichment

In Count VI, the counterclaim plaintiffs assert that Phoenix has been unjustly enriched by its retention of the excess rents in violation of the CMA. *See* Countercls. ¶¶ 129-34. According to the counterclaim plaintiffs, Phoenix has ignored its obligation under the CMA to refund the excess rents, to apply the excess rents to the existing indebtedness, or to use the excess rents to fund fit-outs. *See id.* ¶¶ 131-32. Thus, the counterclaim plaintiffs seek recovery for unjust enrichment.

As Phoenix points out, under both New Jersey law and Pennsylvania law, a claim for unjust enrichment is unavailable when an express contract between the parties defines the parties' rights with respect to the subject matter at issue. *See* Phoenix Mem. at 33 n.13 (citing *Benefit Trust Life Ins. Co. v. Union Nat'l Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir. 1985) (applying Pennsylvania law); *C.B. Snyder Realty Co. v. National Newark & Essex Banking Co.*, 101 A.2d 544, 553 (N.J. 1953) (applying New Jersey law)). Because the counterclaim plaintiffs clearly allege that the CMA governs their right to the excess rents, a claim against Phoenix for unjust enrichment due to a violation of the CMA is unavailable to the counterclaim plaintiffs under either New Jersey or Pennsylvania law. *See* Countercls. ¶¶ 131-32

For this reason, I conclude that Phoenix has clearly demonstrated "that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count VI. *Hishon*, 467 U.S. at 73. As a result, the court will grant Phoenix's motion to dismiss with respect to Count VI and will dismiss that count with prejudice.

7. Count VII: Imposition of a Constructive Trust

In Count VII, the counterclaim plaintiffs claim that the excess rents should be placed in a constructive trust because Phoenix violated the fiduciary duty it owed to them with respect to the excess rents. *See* Countercls. ¶¶ 137-41. Specifically, the counterclaim plaintiffs assert that Phoenix agreed to use the excess rents for their benefit and that Phoenix has refused to do so. *See id*. ¶¶ 138-39.

Under both Pennsylvania law and New Jersey law, a court may grant the equitable remedy of the imposition of a constructive trust if property is wrongfully held due to the breach of a confidential relationship. *See D'Ippolito v. Castoro*, 242 A.2d 617, 619 (N.J. 1968); *Yohe v. Yohe*, 353 A.2d 417, 420-21 (Pa. 1976). Phoenix argues that Count VII should be dismissed because Phoenix's only obligations to the counterclaim plaintiffs with respect to the excess rents were contractual and that a breach of contract cannot, by itself, form the basis for a request for the imposition of a constructive trust. *See* Phoenix Mem. at 34-35. Moreover, Phoenix contends that it was under no contractual obligation to use the excess rents for the benefit of the counterclaim plaintiffs. *See id*.

Addressing Phoenix's last contention, as previously discussed, the contracts attached as exhibits to the counterclaims create no obligation for Phoenix to use the excess rents for the benefit of the counterclaim plaintiffs. *See supra* Parts III.B.2 (discussing Phoenix's possible duty under the contracts to fund fit-outs), III.B.5 (discussing Phoenix's possible duty under the contracts to refund the excess rents or apply them to the existing indebtedness). It is unclear, however, whether Phoenix had an obligation pursuant to an oral contract to use the excess rents for the benefit of the counterclaim plaintiffs. *See supra* Part III.B.2 (discussing the allegations of

Phoenix's oral agreement to fund the PCC fit-out). Because the counterclaim plaintiffs may establish the existence of this obligation, I am unwilling to conclude at this early stage of the proceedings that Phoenix had no contractual obligation to use the excess rents for the benefit of the counterclaim plaintiffs.

Moreover, I cannot currently accept Phoenix's argument that any duty it may have owed to the counterclaim plaintiffs with respect to the excess rents was solely contractual in nature. As previously discussed, Phoenix may have owed a fiduciary duty to Assocs. *See supra* Part III.B.3. Thus, Phoenix may have owed Assocs. both a contractual duty and a fiduciary duty with respect to the excess rents.

Because both of Phoenix's arguments are unsuccessful, I conclude that Phoenix has not clearly demonstrated "that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count VII. *Hishon*, 467 U.S. at 73. As a result, the court will deny Phoenix's motion to dismiss with respect to Count VII.

8. Count VIII: Intentional Interference with Contractual Relations

In Count VIII, the counterclaim plaintiffs claim that Phoenix intentionally interfered with Assocs.' existing contracts with tenants and with Assocs.' prospective contracts with future tenants. *See* Countercls. ¶¶ 144-47. Specifically, the counterclaim plaintiffs allege that this interference occurred when Phoenix breached its contractual obligations to pay the monthly operating expenses and fund fit-outs. *See id.* ¶ 145.

Phoenix argues that, under Pennsylvania law, a defendant's breach of a contract with a plaintiff may not give rise to a cause of action for intentional interference with contractual

relations.[6] *See* Phoenix Mem. at 36-37. Phoenix is almost correct. In only very particular circumstances may a claim for intentional interference with contractual relations be based on such a breach of contract. *See Valley Forge Convention & Visitors Bureau v. Visitor's Servs., Inc.*, 28 F. Supp. 2d. 947, 951-52 (E.D. Pa. 1998). These particular circumstances include "the defendant act[ing] for the malevolent purpose of interfering with the plaintiff's existing or prospective business relationships." *Id*. at 951. Moreover, the breaching conduct "must have been directed by the defendant to a third party and not the plaintiff." *Id*. at 952; *see Craig v. Salamone*, Civ. A. No. 98-3685, 1999 WL 213368, at *8 (E.D. Pa. Apr. 8, 1999).

Count VIII is devoid of any allegations supporting, or allowing the court to reasonably infer, the existence of the unusual circumstances required for the pursuit of the counterclaim plaintiffs' counterclaim for intentional interference with contractual relations. *See* Countercls. ¶¶ 142-49. For this reason, the court concludes that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" in Count VIII. *Hishon*, 467 U.S. at 73. As a result, I will grant Phoenix's motion to dismiss with respect to Count VIII and will dismiss that count without prejudice to the counterclaim plaintiffs' right to amend that count to remedy the defects therein.

C. Standing of Casnoff and Shaw

Phoenix also challenges the standing of Casnoff and Shaw to assert the counterclaims. *See* Phoenix Mem. at 39-41. As previously explained, Casnoff and Shaw are the general partners

[6]The parties agree that Pennsylvania law applies to Count VIII. *See* Phoenix Mem. at 35 n.14 (stating Phoenix's position that Pennsylvania law applies); Countercl. Pls.' Resp. at 21-26 (citing only Pennsylvania cases).

of P & A, and P & A is the general partner of Assocs. *See* Countercls. ¶¶ 59-61. Phoenix argues that if it owed the duties and obligations at issue in the counterclaims to any party, then it owed them to Assocs. because Assocs. owned the properties, owed Phoenix the existing indebtedness, entered into contracts with the tenants of the properties, and were the sole parties bound by all relevant contracts.[7] *See* Phoenix Mem. at 39; *see also supra* Part III.B (discussing the duties and obligations of Phoenix at issue in the counterclaims). *See generally* Countercls. Exs. A-F, M (supporting Phoenix's assertion that the relevant contracts bound Assocs. and not Casnoff and Shaw). Thus, Phoenix argues that the only pertinent relationship it had with Casnoff and Shaw was based solely on Casnoff and Shaw's ability to speak on behalf of Assocs. as the general partners of the general partner of Assocs. *See* Phoenix Mem. at 39-41.

As a result of the foregoing, Phoenix contends that Casnoff and Shaw lack standing to pursue the counterclaims and that the court should dismiss all of their counterclaims. *See id*. Casnoff and Shaw argue that they have standing as guarantors who suffered an injury that was separate and distinct from that suffered by the guaranteed entity or, alternatively, that they are indispensable parties under Federal Rule of Civil Procedure 19. *See* Countercl. Pls.' Resp. at 4 n.4. Because the court concludes that Casnoff and Shaw did not suffer a separate and distinct injury and that they are not indispensable parties, the court will grant Phoenix's motion to dismiss with respect to the counterclaims of Casnoff and Shaw. The court will dismiss the counterclaims of Casnoff and Shaw without prejudice to their right to amend the counterclaims to remedy the defects therein.

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[7]Phoenix argues that the guarantee is not a relevant contract because the counterclaim plaintiffs assert no claim involving it, such as a breach of its terms or a frustration of its purpose. *See* Phoenix Mem. at 40.

1. Standing as Guarantors

The parties agree that generally Casnoff and Shaw would not have standing to pursue these counterclaims against Phoenix merely because they are guarantors of Assocs.' debt to Phoenix. *See id*. (citing *Temp-Way*, 139 B.R. at 316-17); Counterclaim Pls.' Resp. at 4 n.4 (citing *Temp-Way*, 139 B.R. at 317). The parties also agree that this general rule does not apply if Casnoff and Shaw, as guarantors, have "suffer[ed] an injury separate and distinct from that suffered by [Assocs.]." *Temp-Way*, 139 B.R. at 317; *see* Countercl. Pls.' Resp at 4 n.4; Phoenix Reply at 21. The parties do not, however, agree on whether Casnoff and Shaw have actually suffered such a separate and distinct injury. *See* Countercl. Pls.' Resp at 4 n.4; Phoenix Reply at 21.

In their response, the counterclaim plaintiffs baldly state that Casnoff and Shaw have suffered an injury that is separate and distinct from any allegedly suffered by Assocs. *See* Countercl. Pls.' Resp. at 4 n.4. As Phoenix points out, however, there is no support for this assertion in either the counterclaims or the counterclaim plaintiffs' response. *See* Phoenix Reply at 21. The counterclaims contain no allegation, nor can any reasonable inference be drawn, that Casnoff and Shaw suffered damage other than as guarantors of Assocs.' debt to Phoenix (and indirectly as general partners of the general partner of Assocs.). *See* Countercls. ¶¶ 102, 108, 114, 116, 121, 127, 149 (alleging damage only to "Counterclaim Plaintiffs" as a whole and never suggesting any damage to Casnoff and Shaw in particular). Moreover, in their response, the counterclaim plaintiffs fail to explain what the separate and distinct injury was, fail to explain how it was separate and distinct, and fail to cite anything in support of the existence of a separate and distinct injury. *See* Countercl. Pls.' Resp. at 4 n.4.

Consequently, the court concludes that Casnoff and Shaw have not suffered a separate and distinct injury and declines to accept their first argument against the dismissal of their claims.

2. Status as Indispensable Parties

The counterclaim plaintiffs also argue without any explanation that Casnoff and Shaw may not have their claims dismissed because they are indispensable parties under Federal Rule of Civil Procedure 19. *See* Countercl. Pls.' Resp. at 4 n.4. The Third Circuit has explained Rule 19 in the following manner:

> Subsection (a) of Rule 19 addresses the issue of whether a party should be joined as a "necessary" party. Subsection (b) concerns the issue of whether a party is an "indispensable" party. . . . If the party is determined to be a necessary party but cannot be joined because such joinder would defeat diversity, it must then be determined whether the absent party is an indispensable party.

Koppers Co. v. Aetna Cas. & Sur. Co., 158 F.3d 170, 175 (3d Cir. 1998) (footnote and citation omitted). If a party is not necessary, however, it is not indispensable. *See id*. at 176. The Third Circuit also explained the circumstances in which a party is necessary:

> Rule 19(a) states that a party is necessary if either (1) the present parties will be denied complete relief in the absence of the party to be joined, or (2) the absent party will suffer some loss or be put at risk of suffering such a loss if not joined.

Id. at 175.

There is no indication that complete relief for the counterclaims cannot be accorded among Phoenix, Assocs., and P & A, the remaining parties to the counterclaims. Dismissing Casnoff and Shaw as counterclaim plaintiffs will not hinder the ability of Assocs. and P & A to

fully recover from Phoenix on any counterclaim. Moreover, because only Casnoff and Shaw's status as counterclaim plaintiffs and not their status as defendants is at issue, there is no danger of Phoenix losing its ability to obtain complete relief from them as guarantors in the underlying suit. Thus, Rule 19(a)(1) does not qualify Casnoff and Shaw as necessary parties to the counterclaims because "complete relief can be accorded to the [remaining] parties . . . to this litigation without [Casnoff and Shaw's presence as counterclaim plaintiffs]." *Koppers*, 158 F.3d at 176; *see* Fed. R. Civ. P. 19(a)(1).

Moreover, Casnoff and Shaw will not suffer a loss or risk suffering a loss as a result of having their claims dismissed. Casnoff and Shaw will continue to control the remaining counterclaim plaintiffs, Assocs. and P & A, through their positions as general partners, so Casnoff and Shaw's ability to protect their interests "will not be impaired or impeded by the disposition of the [counterclaims] in [their] absence." *Koppers*, 158 F.3d at 176; *see* Fed. R. Civ. P. 19(a)(2)(i). Similarly, there is no indication that Phoenix will face a "risk of multiple or otherwise inconsistent obligations as a result of [Casnoff and Shaw's] absence from [the counterclaims]." *Koppers*, 158 F.3d at 176; *see* Fed R. Civ. P. 19(a)(2)(ii); *see also supra* Part III.C.1.

For these reasons, the court concludes that Casnoff and Shaw are not necessary parties to the counterclaims under Rule 19(a). Consequently, they are also not indispensable parties under Rule 19(b), and their second argument is unavailing. *See Koppers*, 158 F.3d at 176.

IV. Conclusion

The court will grant Phoenix's motion to dismiss with respect to the conversion and unjust enrichment counterclaims in Counts V and VI because the contracts attached as exhibits to the counterclaims preclude the assertion of these causes of action. The court will also grant Phoenix's motion to dismiss with respect to the intentional interference with contractual relations counterclaim in Count VIII because Count VIII gives no indication that the interference alleged was motivated by a malevolent purpose or directed to a third party. Moreover, the court will grant Phoenix's motion to dismiss with respect to all counterclaims by Casnoff and Shaw because they lack standing as guarantors and are not indispensable parties. The court will deny Phoenix's motion in all other respects. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHOENIX FOUR GRANTOR TRUST #1	:	
Plaintiff and Counterclaim Defendant	:	CIVIL ACTION
	:	
v.	:	
	:	
642 NORTH BROAD STREET	:	NO. 00-597
ASSOCIATES, et al.	:	
Defendants and Counterclaim Plaintiffs	:	

ORDER

YOHN, J.

AND NOW, this day of June, 2000, upon consideration of the counterclaim defendant's motion to dismiss and memoranda in support thereof (Doc. Nos. 6, 7, 12) and the counterclaim plaintiffs' memoranda in opposition thereto (Doc. Nos. 9, 15), IT IS HEREBY ORDERED that the motion to dismiss is GRANTED IN PART and DENIED IN PART. The motion to dismiss is GRANTED with respect to Counts V, VI, and VIII. Counts V and VI are DISMISSED WITH PREJUDICE. Count VIII is DISMISSED WITHOUT PREJUDICE to the counterclaim plaintiffs' right to amend that count within 10 days of the date hereof. The motion to dismiss is also GRANTED with respect to all counts asserted by Alan Casnoff and Peter Shaw. All counts asserted by Alan Casnoff and Peter Shaw are DISMISSED WITHOUT PREJUDICE to their right to amend those counts within 10 days of the date hereof. The motion to dismiss is DENIED with respect to Counts I, II, III, IV, and VII asserted by the other counterclaim plaintiffs.

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William H. Yohn, Jr.